

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:WR:SCA:LN:TL-N-1471-00
JMMarr

date: JUN 12 2000

to: Chief, Appeals Division, Southern California District
Attn: Jeffrey M. Galante, Associate Chief
Attn: Jon B. Hales, Appeals Officer

from: Joyce M. Marr, ^{JMM}Attorney
June Y. Bass, Assistant District Counsel
District Counsel, Southern California District, Laguna Niguel

subject: [REDACTED]
Advisory Opinion Concerning Forms 872
EIN: [REDACTED]
Income Tax Years: [REDACTED], [REDACTED] and [REDACTED]

DISCLOSURE STATEMENT

This advice constitutes return information subject to I.R.C. § 6103. This advice contains confidential information subject to attorney-client and deliberative process privileges and if prepared in contemplation of litigation, subject to the attorney work product privilege. Accordingly, the Examination or Appeals recipient of this document may provide it only to those persons whose official tax administration duties with respect to this case require such disclosure. In no event may this document be provided to Examination, Appeals, or other persons beyond those specifically indicated in this statement. This advice may not be disclosed to taxpayers or their representatives.

This advice is not binding on Examination or Appeals and is not a final case determination. Such advice is advisory and does not resolve Service position on an issue or provide the basis for closing a case. The determination of the Service in the case is to be made through the exercise of the independent judgment of the office with jurisdiction over the case.

This is in reply to your request dated March 8, 2000, for advice on: (1) the validity of Consents to Extend the Time to Assess Tax (Forms 872) previously secured by Exam; and (2) the proper way to caption Forms 872 to be secured to extend the time to assess beyond [REDACTED]. As discussed below, subsequent to forwarding to us your request for advice, you obtained a Form 872 to extend the assessment period to [REDACTED].

ISSUE

Whether Forms 872 secured to extend the time to assess income taxes against the [REDACTED] consolidated group for [REDACTED], [REDACTED], and [REDACTED] are valid?

CONCLUSION

Yes, the Forms 872 can be defended as valid waivers of the period of limitations through [REDACTED], for the [REDACTED] consolidated group for the [REDACTED], [REDACTED], and [REDACTED] tax years.

The revenue agent assigned to this matter has recently informed you that [REDACTED] alleges that the proper party to execute the Forms 872 is [REDACTED]. There may be facts which the Service is unaware of that support this conclusion. Accordingly, in an abundance of caution, we recommend that you obtain a consent to extend the time to assess beyond [REDACTED], for the [REDACTED] year captioned "[REDACTED] [REDACTED], Successor in Interest to [REDACTED] [REDACTED], formerly known as [REDACTED]" executed by a duly authorized officer of [REDACTED].¹ Place an asterisk immediately after the word "[REDACTED]" and at the bottom of the first page of the Form 872, place another asterisk and right after it type:

With respect to the consolidated tax liability of the [REDACTED], formerly known as [REDACTED] (EIN: [REDACTED]) and Subsidiaries consolidated group for the taxable year [REDACTED].

¹We realize that it may be asserted that prior consents so captioned were not signed by a duly authorized officer of [REDACTED]. In that event, we believe it can be successfully asserted that the individuals who signed the consents had apparent authority to execute them.

FACTS²

[REDACTED], which was the common parent of the [REDACTED] consolidated group, filed a consolidated income tax return for the taxable year ended December 31, [REDACTED]. On the return, which was received by the Internal Revenue Service (the Service) on [REDACTED], [REDACTED] listed two subsidiaries: [REDACTED] - [REDACTED] (EIN [REDACTED]) and [REDACTED] (EIN [REDACTED]).

According to information retrieved from the LEXIS CABIZ file, on [REDACTED], [REDACTED] underwent a name change to [REDACTED]. It filed a consolidated return for the taxable year ended December 31, [REDACTED], on which "[REDACTED]" (Formerly [REDACTED]) was inserted in the space for "Name." Two subsidiaries were listed on this return: [REDACTED] - [REDACTED] (EIN [REDACTED]) and [REDACTED] (EIN [REDACTED]).

For the taxable year ended December 31, [REDACTED], a consolidated return was received by the Service from "[REDACTED]" on [REDACTED]. The same two subsidiaries were listed on the [REDACTED] return as were previously listed on the returns for [REDACTED] and [REDACTED].

The same Employer identification number, [REDACTED], was reflected for [REDACTED] (formerly [REDACTED]) on the consolidated returns filed for [REDACTED], and [REDACTED]. Each of these returns and LEXIS indicate that [REDACTED] was incorporated on [REDACTED].

As of [REDACTED], [REDACTED] entered into an Agreement and Plan of Merger (the Merger Agreement) with [REDACTED], a corporation organized under the laws of Germany, and [REDACTED], a Delaware corporation and an indirect wholly owned subsidiary of [REDACTED].³

²Our understanding of the facts of this case is limited to the facts set forth in the Appeals Division's request for our advice, additional information that the Appeals Division and the Examination Division have provided to us, and information we have located on LEXIS. If you learn that any of the facts known to us are incorrect or incomplete in any material respect, you should contact our office immediately.

³ According to information obtained from the LEXIS COMPANY file, at the time in question, [REDACTED] was a wholly owned subsidiary of [REDACTED], the [REDACTED] company in Germany.

The Merger Agreement provides that: (1) [REDACTED] shall cause [REDACTED] to offer to purchase all outstanding common stock, no par value, of [REDACTED] through a tender offer at a price of \$ [REDACTED] per share, net to the seller in cash; and (2) [REDACTED] would merge into [REDACTED], with the separate corporate existence of [REDACTED] ceasing and [REDACTED] continuing its existence under the laws of the State of California as the surviving corporation.

According to information obtained from LEXIS, at midnight (EDT) on [REDACTED], [REDACTED] successfully completed its tender offer for all outstanding common shares of [REDACTED] and based on a preliminary count, [REDACTED] shares of [REDACTED] common stock were tendered and accepted for payment in accordance with the terms of the offer, resulting in [REDACTED] and its subsidiaries owning approximately [REDACTED]% of the shares of [REDACTED] outstanding common stock.

Since [REDACTED] acquired, pursuant to the tender offer, more than [REDACTED] percent of the outstanding shares of [REDACTED] the merger which was agreed to in the Merger Agreement was effected under California's short form merger statute. By virtue of the merger, each share of [REDACTED] common stock owned by [REDACTED] any subsidiary of [REDACTED], [REDACTED] or any subsidiary of [REDACTED] was canceled and ceased to exist. In addition, each remaining share of [REDACTED] common stock was converted into the right to receive \$ [REDACTED] in cash, without interest. The short form merger was effective on [REDACTED]. By virtue of this short form merger, [REDACTED] became a wholly-owned subsidiary of [REDACTED] parent corporation, [REDACTED], a Delaware corporation, which was a wholly-owned subsidiary of [REDACTED]. [REDACTED] held in safekeeping Certificate # [REDACTED] for [REDACTED] shares of its common stock registered in the name of [REDACTED].

[REDACTED] (EIN [REDACTED]) filed a consolidated income tax return for the short period beginning on [REDACTED], and ending on [REDACTED]. On this short-period return, [REDACTED] stated that it was incorporated on [REDACTED]. Thus, this was the initial return filed by [REDACTED].

[REDACTED] included the following corporations on the Affiliations Schedule (Form 851) for the consolidated

return it filed for the short period ended December 31, [REDACTED]:

[REDACTED] (EIN [REDACTED]), [REDACTED]
[REDACTED] (EIN [REDACTED]), and [REDACTED]
(EIN [REDACTED]). [REDACTED] also included the
aforesaid three corporations on the Affiliations Schedule for a
short-period return filed by it for the tax year beginning
[REDACTED], and ending [REDACTED].

[REDACTED] was an indirect subsidiary of [REDACTED]
[REDACTED], a German corporation which is the ultimate parent of [REDACTED]
[REDACTED] group of companies. On [REDACTED], as part
of an internal reorganization of the [REDACTED] group corporate
structure, all of the shares of [REDACTED] were
transferred to [REDACTED], a Delaware corporation.

On the Affiliations Schedule for [REDACTED]'s [REDACTED]
consolidated income tax return, [REDACTED] included the
following corporations: [REDACTED] (EIN [REDACTED])
[REDACTED] (EIN [REDACTED]),
[REDACTED] (EIN [REDACTED]), and [REDACTED]
(EIN [REDACTED]).

[REDACTED] is still in existence. [REDACTED]
[REDACTED] is its immediate parent.

By a "Unanimous Written Consent," the Board of Directors of
[REDACTED] adopted the following resolution effective [REDACTED]
[REDACTED]:

[REDACTED]

With respect to the consolidated income tax returns filed by
[REDACTED] for the years [REDACTED] through [REDACTED], inclusive, the
following Consents to Extend the Time to Assess Tax (Forms 872)
have been executed:

<u>Year</u>	<u>Name of Taxpayer as Shown on Form 872</u>	<u>Date Executed For Taxpayer</u>	<u>The Service</u>	<u>Date to Which Statute Extended</u>
[REDACTED]	[REDACTED] formerly known as [REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
	[REDACTED] Successor in Interest to [REDACTED] formerly known as [REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
	[REDACTED] formerly known as [REDACTED] & [REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]

<u>Year</u>	<u>Name of Taxpayer as Shown on Form 872</u>	<u>Date Executed For Taxpayer</u>	<u>The Service</u>	<u>Date to Which Statute Extended</u>
	[REDACTED], formerly known as [REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
	[REDACTED], Successor in Interest to [REDACTED] formerly known as [REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
	[REDACTED], formerly known as [REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
	[REDACTED], Successor in Interest to [REDACTED] formerly known as [REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
	[REDACTED] formerly known as [REDACTED] & [REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
	[REDACTED], formerly known as [REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
	[REDACTED], Successor in Interest to [REDACTED] formerly known as [REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
	[REDACTED], Successor in Interest to [REDACTED] formerly known as [REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
	[REDACTED], formerly known as [REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]

⁴Immediately after the caption on this Form 872, an asterisk has been inserted and the following statement has been typed at the bottom of the form, "*With respect to the consolidated tax liability of the [REDACTED] (EIN: [REDACTED]) and Subsidiaries consolidated group for taxable years [REDACTED] [REDACTED] and [REDACTED]."

⁵ See infra footnote 4.

<u>Year</u>	<u>Name of Taxpayer as Shown on Form 872</u>	<u>Date Executed For Taxpayer</u>	<u>The Service</u>	<u>Date to Which Statute Extended</u>
	██████████ formerly known as ██████████	██████████	██████████	██████████
	██████████, Successor in Interest to ██████████ formerly known as ██████████	██████████	██████████	██████████
	██████████, Successor in Interest to ██████████ formerly known as ██████████	██████████	██████████	██████████
	██████████ formerly known as ██████████	██████████	██████████	██████████

██████████, in the capacity of Executive Vice President and Chief Financial Officer of ██████████ executed the Forms 872 executed on the taxpayer's behalf in ██████████, ██████████, ██████████, and ██████████. The President and CEO of ██████████ also executed the Form 872 which was executed in ██████████.

██████████ executed the Forms 872 executed on behalf of the taxpayer on ██████████, ██████████, and ██████████, in the portion of the form designated for the signature of "corporate officer(s)." The Forms 872 executed on ██████████ and ██████████ lists the EINs of both ██████████ and ██████████ in the upper right-hand corner. The Form 872 executed on ██████████ lists the EIN of only ██████████ in the upper right-hand corner.

On the Forms 872 executed on ██████████, ██████████'s title is handwritten next to his signature as "Senior VP & CFO." ██████████'s title does not appear on the Form 872 which he executed on ██████████. On the Form 872 ██████████ executed on ██████████, his title is typewritten next to his name as "Sr.V.P., Treasurer & CFO."

In the space provided in the signature block area for inserting a "corporate name," no corporate name was inserted on the Forms 872 executed by ██████████ on ██████████, and ██████████. On the Form 872 signed by him on ██████████, the corporate name "██████████ formerly known as ██████████" was inserted in such space.

⁶ See infra footnote 4.

The Form 872 [REDACTED] executed on [REDACTED], was prepared by the Service and mailed by Appeals Officer Jon Hales (Mr. Hales) to "[REDACTED] (fka [REDACTED])" by a letter dated [REDACTED]. The letter indicated in the upper-right hand corner that it was for the tax periods ended [REDACTED] and [REDACTED]. The letter stated, "[t]he time limitation for assessing tax will expire before Appeals can complete consideration of this case." Mr. Hales had previously contacted [REDACTED] representative to offer him a conference with Appeals for tax years [REDACTED] and [REDACTED].

DISCUSSION

I.R.C. § 1501 grants affiliated groups of corporations the privilege of filing returns on a consolidated basis. If consolidated returns are filed, the members of the group consent to be bound by the legislative regulations promulgated under the authority of I.R.C. § 1502; I.R.C. § 1501.

Where the common parent remains in existence, even if it no longer is the common parent, it remains the agent for the group with regard to years in which it was the common parent of the group. Treas. Reg. § 1.1502-77(a); Southern Pacific Co. v. Commissioner, 84 T.C. 395, 401 (1985).

Temp. Reg. § 1.1502-77T, which was promulgated in 1988 by the Service to supplement Treas. Reg. § 1.1502-77, modifies the "exclusive agent" rule of Treas. Reg. § 1.1502-77(a). Where a common parent corporation ceases to be the common parent of a group, whether or not the group remains in existence, Temp. Reg. § 1.1502-77T(a)(4) provides "alternative agents" for the affiliated group, but only for purposes of mailing notices of deficiency and for executing waivers of the statute of limitations. Any one or more of the following corporations may act as "alternative agents" for the group: (i) the common parent of the group for all or any part of the year to which the notice or waiver applies; (ii) a successor to the former common parent in a transaction to which I.R.C. § 381(a) applies; (iii) the agent designated by the group under Treas. Reg. § 1.1502-77(d); or (iv) if the group remains in existence under Treas. Reg. § 1.1502-75(d)(2) or (3), the common parent of the group at the time the waiver is given.

Temp. Reg. § 1.1502-77T is effective for taxable years for which the due date (without extensions) for filing the consolidated return is after September 7, 1988. Temp. Reg. § 1.1502-77T(b). Simultaneous with the promulgation of the temporary regulation, the Service amended Treas. Reg. § 1.1502-77

by adding paragraph (e), cross referencing to Temp. Reg. § 1.1502-77T.

The crucial issue in the present case is whether [REDACTED] or [REDACTED] is the proper party to extend the statute of limitations with respect to the [REDACTED] consolidated group for the years preceding the merger of [REDACTED] with [REDACTED].

Temp. Reg. § 1.1502-77T governs here. It applies to this case because: (a) [REDACTED] which was the common parent corporation of the [REDACTED] consolidated group, has ceased to be the common parent; and (2) the statutes of limitations that Appeals seeks to extend are for taxable years for which the due date (without extensions) for filing of the consolidated returns is after September 7, 1988.

Temp. Reg. § 1.1502-77T(a)(4)(i) provides as an "alternative agent" the common parent of the group for all or any part of the year to which the waiver applies. [REDACTED] was the common parent of the [REDACTED] consolidated group for the years to which the waivers apply. [REDACTED] is still in existence. Therefore, [REDACTED] is the proper party to execute a Form 872 with respect to [REDACTED] consolidated group's [REDACTED], [REDACTED], and [REDACTED] tax years.

The other subparagraphs of Temp. Reg. § 1.1502-77T(a)(4) are inapplicable. Subparagraph (a)(4)(ii), which provides as an alternative agent a successor to the former common parent in a transaction in which I.R.C. § 381(a) applies, is inapplicable because [REDACTED] survived the merger and has no successor. Subparagraph (a)(4)(iii), which provides as an alternative agent the agent designated by the group under Treas. Reg. § 1.1502-77(d), is inapplicable because [REDACTED] has not dissolved nor does it appear that it contemplates dissolution, contrary to the requirement of Treas. Reg. § 1.1502-77(d).

Nor do we believe that subparagraph (a)(4)(iv), which provides as an alternative agent the common parent of the group at the time the waiver is given where the group remains in existence following a reverse acquisition or downstream transfer, is applicable to the facts of this case. The facts do not show that a downstream transfer occurred. In addition, the merger of [REDACTED] with [REDACTED] did not constitute a reverse acquisition. First, the shareholders of [REDACTED] did not receive any stock of [REDACTED] or [REDACTED] in exchange for their [REDACTED] shares; instead, they received cash in exchange for their shares of [REDACTED].

██████████ outstanding common stock. Second, the ██████████ consolidated group filed a short year tax return for the year ended ██████████, thus indicating that the group ceased to exist. In a reverse acquisition, the acquired consolidated group continues in existence. See Treas. Reg. § 1.1502-75(d)(3). Therefore, we are of the opinion that the merger did not constitute a reverse acquisition.

Thus, ██████████ is the proper party to execute the Forms 872 with respect to the ██████████ consolidated group's taxable years ██████████ and ██████████. As is indicated in the preceding summary of FACTS, all of the Forms 872 secured by the Service for the aforesaid tax years have been executed by officers of ██████████ duly authorized to execute the Forms 872 on its behalf. See Rev. Rul. 83-41, 1983-1 C.B. 399, clarified and amplified, Rev. Rul. 84-165, 1984-2 C.B. 305.

The Forms 872 executed on behalf of the taxpayer on ██████████, and ██████████, erroneously show the name of the taxpayer as "██████████, Successor in Interest to ██████████, formerly known as ██████████." There were no other Forms 872 executed to hold the statutes of limitations open beyond ██████████ until the Form 872 was secured in ██████████ correctly reflecting the taxpayer's name as "██████████, formerly known as ██████████." Therefore, we must consider whether the Forms 872 which were executed on ██████████ and ██████████ are valid.

A consent to extend the period of limitations is essentially a unilateral waiver of a defense by the taxpayer and is not a contract. Strange v. United States, 282 U.S. 270 (1931); Kelley v. Commissioner, 45 F.3d 348, 350 n.4 (9th Cir. 1995); Piarulle v. Commissioner, 80 T.C. 1035, 1042 (1983). Contract principles are significant, however, because I.R.C. § 6501(c)(4) requires that the parties reach a written agreement as to the extension. Piarulle, 80 T.C. at 1042. The term "agreement" means a manifestation of mutual assent. Id. It is the objective manifestation of mutual assent as evidenced by the parties' overt acts that determines whether the parties have made an agreement. Kronish v. Commissioner, 90 T.C. 684, 693 (1988).

When a written agreement to extend the period for making assessments is ambiguous, extrinsic evidence is admissible to clarify the ambiguity and to determine the parties' intent. The extension will then be interpreted in accordance with the parties' intent. Constitution Publishing Co. v. Commissioner, 22 B.T.A. 426 (1931). A written instrument is ambiguous when it can reasonably be interpreted to have more than one meaning. Sawyer v. Commissioner, T.C. Memo. 1988-12.

Generally, a consent that is clear on its face and that contains no ambiguous language is the objective manifestation of mutual assent and will stand by itself. That is, the Court will not consider extrinsic evidence of the parties' intent when interpreting the agreement reached by the parties.

This general rule, however, does not apply where the parties have made a "mutual mistake" in the drafting of the consent (also referred to as a "scrivener's mistake"). See Woods v. Commissioner, 92 T.C. 776, 782-784 (1989); see also San Francisco Wesco Polymers v. Commissioner, and T.C. Memo. 1999-146; Kelley v. Commissioner, T.C. Memo 1990-158, aff'd, 45 F.3d 348 (9th Cir. 1995). "A mutual mistake exists 'where there has been a meeting of the minds of the parties and an agreement actually entered into but the agreement in its written form does not express what was really intended by the parties.'" Woods, 92 T.C. at 782 (quoting Black's Law Dictionary 920 (5th Ed. 1979)). Under such circumstances, the Court will reform the consent so that it conforms to the agreement of the parties. Woods, 92 T.C. at 782-783; San Francisco Wesco Polymers v. Commissioner, T.C. Memo. 1999-146; Kelley, T.C. Memo 1990-158.

In this case, if the Forms 872 executed by [REDACTED] in [REDACTED] and [REDACTED] mistakenly fail to express the mutual intent of the parties, the Forms 872 properly may be reformed to conform to the parties' intentions, if there is extrinsic evidence to support such action.

We think that there is sufficient extrinsic evidence showing that the taxpayer and the Service intended to extend the period of limitation for [REDACTED], rather than [REDACTED].

First, although the Forms 872 executed on behalf of the taxpayer on [REDACTED] and [REDACTED], listed [REDACTED] as successor to [REDACTED] they listed the taxable years ended December 31, [REDACTED], December 31, [REDACTED], and December 31, [REDACTED] as the periods to be extended. [REDACTED] first filed return was for the period ended December 31, [REDACTED]. Thus, the Forms 872's references to the years ended December 31, [REDACTED], December 31, [REDACTED], and December 31, [REDACTED] must have referred to [REDACTED] not [REDACTED]. Since [REDACTED] was not in existence until [REDACTED], it was not required to file returns and did not have any tax liabilities for the years [REDACTED], [REDACTED], and [REDACTED].

Second, the Forms 872 refer to [REDACTED] as "successor" to [REDACTED]. However, [REDACTED] is not a successor to [REDACTED] which still exists. Rather, [REDACTED] is [REDACTED] immediate parent.

Third, the transmittal letter which forwarded to the taxpayer Form 872 for [REDACTED] and [REDACTED] that was executed on [REDACTED] was addressed to "[REDACTED] (fka [REDACTED])." In addition, the letter was from Mr. Hales who was actively considering [REDACTED] case and had been in contact its representative.

Fourth, the fact that subsequently, on [REDACTED] [REDACTED] executed a Form 872 on behalf of [REDACTED] for the tax years [REDACTED], [REDACTED], and [REDACTED] supports the position that he knew and understood that the Forms 872 he had signed in [REDACTED] and [REDACTED] were meant to extend the statute of limitations for Wyle Electronics, not [REDACTED].

Fifth, although [REDACTED] had no authority to sign on [REDACTED] behalf, [REDACTED] the actual signatory, has such authority.

The taxpayer should be informed here that we are relying on the equitable remedy of reformation of the Forms 872, based on mutual mistake in the drafting of the Forms 872. Thus, it is understood that **both parties** intended that [REDACTED] execute these documents in his role as an officer of [REDACTED]. It seems incoherent to take a position where we assert that it was the taxpayer's ([REDACTED]) intent to execute the forms, but at the same time fear alerting the taxpayer in case it may claim that it did not have such an intent. The intent of the taxpayer is a matter solely in the "mind" of the taxpayer.

The defense that the period of limitations has expired is an affirmative defense that the taxpayer would have to raise. Should [REDACTED] or its subsidiaries challenge the validity of such consents, we will defend their validity on the basis of the analysis described above. As you know, however, there are hazards inherent in litigating any issue and we cannot guarantee any result.

Please contact the undersigned at telephone number (949) 360-2688 if you have any questions or comments concerning the foregoing or would like assistance in drafting a letter to [REDACTED] explaining the potential problems with the consents which have been secured and that the Service is relying on the equitable remedy of reformation of the Forms 872.

Joyce M. Marr

JOYCE M. MARR
Attorney